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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1976

No. ....

JACK BALLARD,  
Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals  
for the Eighth Circuit

**REPLY AND SUPPLEMENTAL BRIEF  
OF PETITIONER**

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**INTRODUCTION**

This reply and supplemental brief of petitioner Jack Ballard is being filed pursuant to Rules 24(4) and (5) of this Court. The government's brief in opposition was due on September 8, 1976, per extension granted by this Court, but was not received by petitioner until September 29, 1976.

### REPLY BRIEF

1. In his petition for a writ of certiorari, petitioner referred to the two government theories in this case (Pet. 11). Now, the government argues (Br. in Opp. 7) a new theory: petitioner's "willful failure to report both the receipts and disbursements of this business was the omission of material matters within the compass of Section 7206(1)." The indictment did not charge a violation of Section 7206(1) for failure to report disbursements. The trial Court did not include the failure to report disbursements as an element of the offense; the only definition of what might constitute a material matter under Section 7206(1) was "that gross income is a material matter" (Tr. 769).

What the government says in its brief in opposition concerning the necessity to disclose disbursements may be appropriate in a civil investigation, but it is not applicable in a criminal prosecution, especially one such as the instant case where evidence of disbursements was systematically excluded by the trial Court. The government's latest theory to sustain the conviction emphasizes the impropriety and necessity for review of this prosecution and conviction.

2. The government recognizes (Br. in Opp. 8) that the indictment charged petitioner with the failure to report "substantial income", but then within the same paragraph, the brief states: "Since petitioner was charged with failing to report gross income, his business expenses were therefore irrelevant to the offense of filing a false return."\* Nowhere in the indictment was there a charge of failure to report "gross income". The government equates "substantial income" with "gross income" because the Court of Appeals did so (Pet. App. A-7 to A-9). We respectfully suggest that the Court of Appeals was in error

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\* Compare the discussion of the relevance and materiality of business expenses two paragraphs earlier (Br. in Opp. 7).

in thus changing the issues framed by the indictment. The issue was whether there was a failure to report "substantial income"; in any determination of such income, business expenses and disbursements are relevant.

3. With reference to petitioner's attack on the failure to give a lesser-included offense instruction under Section 7203, the government states (Br. in Opp. 9) that petitioner "requested no such instruction at trial." Petitioner did indeed request such an instruction, but the prosecutor's objection was sustained (Tr. 724-725).

. . . . .

The brief in opposition does not respond to all issues raised in the petition for writ of certiorari; as to those issues to which it is directed, the brief in opposition has further obfuscated them. We respectfully suggest that this petition presents substantial issues concerning the revenue laws of the United States which should be clarified and delineated by this Court.

### SUPPLEMENTAL BRIEF

Since the filing of the petition for writ of certiorari herein, a decision of the Court of Appeals for the Fifth Circuit has been reported which is in conflict with the decision of the Court of Appeals for the Eighth Circuit herein; the conflict generated by these two opinions should be resolved by this Court. See *United States v. Levy*, 533 F. 2d 969 (5th Cir. 1976).

Throughout the instant case, petitioner has contended that there is no statute or regulation requiring the filing of a Schedule C under the not uncommon factual circumstances of this case. Despite constant requests to the government and its witnesses to point out such a statutory or regulatory requirement, none has been forthcoming.

*Levy* involved a prosecution under Section 7206(1) for filing a false Form 433-AB; the Fifth Circuit determined that there was no regulation requiring such a form. Recognizing that Section 7206(1) is a perjury statute and that "perjury is one of the most serious offenses known to the law", the Fifth Circuit noted the warnings of this Court that "men of common intelligence cannot be required to guess at the meaning of a penal enactment." (533 F. 2d at 973)

The Fifth Circuit said further in *Levy* (l.c. 974):

"That a taxpayer, at the ad hoc discretion of a governmental officer, agent or employee, without any supporting statute or regulation,\* may be required to give a statement of whatever kind, and thereafter be declared a felon in connection with such a statement is at war with the Constitutional due process required of all criminal prosecutions."

The conclusion of the *Levy* opinion may be easily interpolated to apply to the facts of this case (l.c. 974-975):

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\* Compare the testimony of Revenue Agent Purk in the instant case when he was questioned as to the lack of any statute, regulation or other instructions requiring the filing of a Schedule C. After extensive questioning on this subject (Tr. 593-601), Mr. Purk could find no requirement for the filing of a Schedule C when a loss occurred and would not be claimed, but he concluded (Tr. 600-601):

"Now, my own opinion, if the individual don't want to deduct a loss, haven't deducted a loss (*this should probably read*, have him deduct the loss), then whatever taxes there would be, he could give it to the government.

"Q. So your thought is if an individual doesn't want to claim a loss, he nevertheless has to report it and then make a contribution back to the government if he doesn't want to claim the loss?

"A. If he feels that he shouldn't take credit for it."

It would appear that the revenue agent's position was so weird that the Court thereupon (Tr. 601) ordered defense counsel not to "go further into it."

"Under the law uniformly applicable to perjury prosecutions, of whatever kind, the authority of the Internal Revenue [Service] to require [petitioner to file a Schedule C and claim a loss] was an indispensable first step on the road to a felony prosecution, and conviction. In neither § 7206 (1) nor in any duly promulgated regulation are we able to discern such authority with the clarity required to establish a criminal offense.

"We are of the opinion that Congress intended the criminal sanctions imposed by § 7206(1) to apply to any statement or document required by the Internal Revenue Code or by any regulation lawfully promulgated for the enforcement of the Code.

"We do not believe that Congress intended a conviction of felony to be founded upon any and all forms which any revenue agent, officer, or employee, in his own discretion, might choose ad hoc to use in the interrogation of a taxpayer. Due process requires that the taxpayer have notice, by statute or by appropriate regulation duly promulgated thereunder, of the uses to which forms may be put before he may be prosecuted for a felony in connection therewith. We glean from the record that the Internal Revenue Service has *used* [Schedule C for losses] for many years, but without validating its use with an appropriate regulation."

We believe that the decisions of the Eighth Circuit herein and of the Fifth Circuit in the *Levy* case are in conflict and cannot be reconciled. For this additional reason, we respectfully suggest that certiorari should be granted.



**CONCLUSION**

For the reasons set forth in the petition for a writ of certiorari, as well as the reasons set forth herein, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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